83 - 1745

No.

In the Supreme Court of the United States

October Term, 1983

RICHARD F. SULLIVAN,
Petitioner,

vs.

CONSOLIDATED RAIL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTIONS PRESENTED

1. Does application for and acceptance of state worker's compensation benefits by an employee of a wholly-owned subsidiary of a common carrier by rail preclude that employee as a matter of law from seeking redress against the common carrier by rail under the Federal Employers' Liability Act?

2. Where at the time of accident and injury to an employee, a common carrier by railroad was not in fact exercising direct control over that employee or his nominal employer, but the nominal employer was a wholly-owned subsidiary of the common carrier performing auxiliary or supplemental services as determined by the carrier on property owned and maintained by the carrier at actual costs under a contract of indefinite duration, was the state court correct in holding as a matter of law that there was no jury issue as to the carrier's right to control the wholly-owned subsidiary and its employee so as to render such employee an employee within the meaning of the Federal Employers' Liability Act?

3. Where a common carrier by rail creates a wholly-owned subsidiary and by contract designates that subsidiary as an independent contractor, but where the subsidiary performs auxiliary or supplemental services as determined by the carrier on property owned and maintained by the carrier at actual costs under a contract of indefinite duration, does such attempt by the carrier constitute a contract or device whose purpose or intent is to enable the carrier to exempt itself from liability under the Federal Employers' Liability Act and to that extent void as a matter of law?

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OPINIONS BELOW

Petitioner, Richard F. Sullivan, respectfully prays that a writ of certiorari issue to the Supreme Court of the State of Ohio to review the opinion and judgment of that court rendered on February 1, 1984, in Case No. 83-282 (Appendix A). Said opinion and judgment affirmed the opinion and judgment of the Court of Appeals, Tenth Appellate District, Franklin County, Ohio, rendered December 23, 1982 (Appendix B), which affirmed the judgment of the trial court, the Court of Common Pleas of Franklin County, which by opinion dated October 9, 1981, sustained a motion for summary judgment filed by the respondent, Consolidated Rail Corporation (Appendix C).

JURISDICTION OF THE COURT

The entry of judgment by the Supreme Court of Ohio on February 1, 1984, was a final judgment of the highest court of the State of Ohio in which a decision could be rendered. Count Three of petitioner's supplemental complaint (R. 3) dismissed by the trial court on respondent's motion for summary judgment set forth claims arising under the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 and following.

Jurisdiction to review the said judgment of the Supreme Court of Ohio, by writ of certiorari is accordingly conferred upon this Court by Title 28, U.S.C., Section 1257 which provides in portions pertinent to this review as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> "(3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . or statutes of . . . the United States."

STATUTES INVOLVED

The statutes involved in this petition for review are certain sections of the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 and following.

Section 51 of the Federal Employers' Liability Act, Title 45, U.S.C., provides in its pertinent parts:

> "Every common carrier by railroad while engaging in commerce between any of the States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track roadbed, works, boats, wharves, or other equipment."

Title 45, U.S.C., Section 55 of the Federal Employers' Liability Act is also involved and provides:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

Jurisdiction of the federal claim arising under the foregoing Acts on the part of the state court is provided in the Federal Employers' Liability Act, Title 45, U.S.C., Section 56 which provides that "jurisdiction of the United States under this chapter shall be concurrent with that of the courts of the several states."

STATEMENT OF THE CASE

This action for damages for personal injuries was filed in the Court of Common Pleas in Franklin County, Ohio, on July 25, 1979, by petitioner, Richard F. Sullivan, against respondent, Consolidated Rail Corporation (hereinafter referred to as ConRail). The complaint claimed damages for personal injuries sustained by petitioner while working on ConRail's property, alleging negligence, including failure to maintain proper lighting, based on Ohio common law and Ohio's frequenter statute.

At the time he sustained his injuries, the petitioner was nominally employed by Pennsylvania Truck Lines, Inc. (hereinafter referred to as PTL) which was and is a wholly-owned subsidiary of ConRail (R. 25). He thus applied for and received worker's compensation benefits. Subsequent discovery, investigation and research revealed that petitioner was an employee of ConRail, within the meaning of the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51, et seq. (hereinafter referred to as FELA) at the time he sustained his injury. Therefore, petitioner moved for and was granted an order permitting him to file and serve a supplemental complaint and third count against ConRail arising under the FELA.

Subsequently ConRail filed a motion for summary judgment with respect to the FELA portion of petitioner's complaint. Summary judgment was entered by the trial court by entry dated October 21, 1981 (Appendix C), with the express determination that for purposes of appeal there is no just reason for delay. Trial on Counts One and Two of the complaint were stayed pending appeal.

Petitioner appealed the trial court's decision to the Court of Appeals, Tenth Appellate District, Franklin

County, Ohio, and that Court in case No. 81AP-937 rendered opinion dated December 23, 1982 (Appendix B), affirming the judgment of the trial court. Entry of affirmance was made in the Court of Appeals on the same date, December 23, 1982.

On January 18, 1983, petitioner filed notice of appeal to the Supreme Court of Ohio. The Supreme Court of Ohio by order dated April 13, 1983, allowed the motion and directed the Court of Appeals for Franklin County to certify the record to that court. On February 1, 1984, the Supreme Court of Ohio rendered opinion and judgment affirming the decision of the lower courts (Appendix A). Two justices dissented from the opinion.

The two corporations involved in this case, PTL and ConRail, are Pennsylvania corporations doing business in Franklin County, Ohio (R. 10, 17). Petitioner began his nominal employment with PTL at the age of thirty-four in September, 1978, as a truck driver (R. 28). He was employed at the Bliss Avenue and Twentieth Street Yard in Columbus, Ohio.

PTL performs three basic functions at the Bliss Avenue Yard pursuant to Trucking and Terminal Services Agreements (R. 41) and ICC operating authority: (1) it loads and unloads trailer vans on railroad flatcars which are placed on a loading track by railroad employees; (2) it performs pickup and delivery service of trailer vans between the yard and local businesses before and after their shipment on the railroad's flatcars; and (3) it carries shipments by truck between the Columbus terminal and other PTL and ConRail terminals. Both ConRail and PTL have offices, employees and terminal managers at the yard (R. 36, 38, Risinger Depo., pp. 56, 76).

On the date of his injury, March 15, 1979, petitioner and a co-worker were engaged in the process of loading trailer vans on railroad flatcars. The co-worker was responsible for backing the trailer vans with a "commando" truck up a loading ramp and onto a string of flatcars which were placed on the loading track by ConRail employees. It was petitioner's responsibility as the "wrenchman" or "groundman" to wrench down the trailer vans with a power wrench once they were spotted at the appropriate place on the flatcars. It was during the course of loading a trailer van that petitioner lost his right arm when his co-worker overshot the spot where he was to place a trailer van and backed it into the petitioner, pinning his arm against another trailer van which the petitioner was in the process of wrenching down.

Petitioner acknowledges that he was not subject to the direct supervisory control of ConRail at the exact time he was injured. However, a summary of the extensive material obtained through discovery in the trial court concerning the relationship between ConRail and PTL at all times pertinent to this lawsuit reveals the following:

(1) PTL was totally owned by ConRail (R. 25, ConRail's answer to petitioner's interrogatory No. 26) and its present interest in its contract with PTL was assigned to it by ConRail's predecessor, the Penn Central Transportation Company (R. 22, answer to supplemental interrogatory No. 10).

(2) ConRail owned and maintained the property where PTL conducted its business at the Twentieth Street Yard in Columbus (R. 30-34, Risinger Depo., p. 47).

(3) PTL performs almost all of its work for ConRail and its other subsidiaries and on ConRail property (R. 74-86, 87-99, 100-112, PTL's Annual Reports to Interstate

Commerce Commission for 1978, 1979 and 1980; R. 23, ConRail's answer to petitioner's supplemental interrogatory No. 13; and R. 40, PTL's answers to petitioner's request for admission No. 14).

(4) ConRail personnel were responsible for placing railroad cars on the loading tracks and for determining which trailers would be loaded on which cars (R. 37-38, Risinger Depo., pp. 75-76).

(5) PTL's operations were purportedly directed by its Terminal Manager, David Risinger, and ConRail's operations were directed by its Terminal Manager, Bernard Humphrey, although Mr. Humphrey could issue instructions to PTL workers regarding which cars to load in the absence of a PTL supervisor (R. 36, 38, Risinger Depo., pp. 56, 76).

(6) PTL's directors have their offices for the most part at the same location as ConRail's headquarters (R. 74-86, 87-99, 100-112, PTL's Annual Reports to Interstate Commerce Commission for 1978, 1979 and 1980).

(7) ConRail handles the reporting of PTL income and payment of taxes and PTL operated at a net loss for 1978, 1979 and 1980 (R. 74-86, 87-99, 100-112, PTL's Annual Reports to Interstate Commerce Commission for 1978, 1979 and 1980) despite the fact it does at least 80% of its business from ConRail (R. 23, ConRail's answer to petitioner's interrogatory No. 13). Thus, PTL has paid no tax during 1978, 1979 and 1980 (R. 80-81, 93-94, 106-107, ICC Schedules 570 for 1978, 1979 and 1980).

(8) In various reports and schedules filed with the ICC, PTL describes its affiliation with ConRail as one where ConRail "controls" PTL (R. 82-84, 95-97, 108-110, ICC Schedule 600); describes the services performed by

ConRail with respect to PTL as "management" and "leasing of land" (R. 82-84, 95-97, 108-110, ICC Schedule 600); describes ConRail's relationship to each of PTL's activities as one of 100% control in 1978 and 100% controlled in 1979 and 1980 (R. 85-86, 98-99, 111-112, ICC Schedule 610A) and indicates that ConRail and PTL charged each other the "actual costs" of most services (R. 85-86, 98-99, 111-112, ICC Schedule 610A).

(9) PTL's route authority is restricted to service auxiliary to or supplemental of, rail service of ConRail with all shipments moved on railroad bills of lading and at railroad rates (R. 70-71, ICC report of January 5, 1971, p. 506), PTL cannot compete with other shippers (R. 72, Id. p. 12) and by its own admission "functions as nothing more than an instrumentality by means of which the railroad carries out a portion of its own obligation of carriages." (R. 66-67, Applicant's statement of reply of 6/15/70 to ICC re merger application, pp. 10-11).

(10) The Terminal Service Agreement between ConRail and PTL dated 1/1/77 is of indefinite duration (R. 50, ¶12), and (a) requires PTL to comply with employers' liability laws, worker's compensation insurance or indemnify ConRail for the failure (R. 44, ¶5); (b) requires PTL to direct all persons performing its services specifying that such persons "shall not be agents, servants or employees of ConRail" since PTL is deemed by the parties as an independent contractor with respect to all services performed for ConRail (R. 44, ¶5); (c) requires PTL to indemnify and hold ConRail harmless for all claims of liability, even if PTL's agents, servants or employees are found to be ConRail's under the law (R. 45-56, ¶8); and (d) PTL may not assign or subcontract its services without prior written approval of ConRail (R. 45-46, ¶5).

ARGUMENT

A. Reasons for Granting the Petition

This case presents important questions concerning the exclusivity of an employee's remedies under the Federal Employers' Liability Act, as well as the right of that employee and hundreds of employees in similar situations throughout the railroad industry to have a jury decide whether or not a railroad which wholly owns their nominal employer's corporation has a right to control that corporation if and when it chooses thereby creating a master-servant relationship which brings that employee within the provisions of the Federal Employers' Liability Act.

The decision rendered below by the Supreme Court of Ohio precluding an individual from seeking redress under FELA when he previously applied for and received worker's compensation without knowledge of his rights under the FELA is in direct conflict with holdings of this Court which have consistently held the FELA to be the exclusive remedy for an employee who falls within its purview. *Erie R. Co. v. Winfield,* 244 U.S. 170 (1917); *New York Central R. Co. v. Winfield,* 244 U.S. 147 (1917); *South Buffalo R. Co. v. Ahern,* 344 U.S. 367 (1953).

If this totally irreconcilable decision by the Supreme Court of Ohio is permitted to stand unreviewed by this Court, the door will be opened to serious erosion not only of federal statutory rights granted employees by the FELA, but also to erosion of other federally granted statutory rights when the courts of any state see fit to so rule.

Secondly, the decision by the Supreme Court of Ohio in this case should also be reviewed by this Court because that portion of the decision dealing with whether or not

petitioner is an employee of respondent, ConRail, under the FELA totally conflicts with a final decision by a Court of Appeals in another state (New Jersey) *Pelliccioni v. Schuyler Packing Co.*, and Penn Central Transportation Company (ConRail's predecessor), 356 A.2d 4 (N.J. App. 1976). In *Pelliccioni*, this Court at 419 U.S. 1099 (1975) previously granted the plaintiff's petition for a writ of certiorari and remanded the case for reconsideration of the facts in the case in light of the proper legal standards enumerated in *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974).

While the plaintiff in *Pelliccioni, supra*, prevailed on facts almost identical to the facts in this lawsuit involving the very predecessor to the respondent herein, the decision of the Ohio Supreme Court prevents this petitioner a trial by jury thus denying him a determination of his rights under the FELA under similar circumstances. This is a serious denial of rights granted by federal statutes which should be reviewed by this Court to insure consistent results throughout the various states where the issue arises.

Finally, this Court should review the decision of the Supreme Court of Ohio in this case because a fundamental question arising by federal statute has not been addressed by any of the three courts below who have rendered opinions in this case (Appendices A, B and C). The issue involves whether or not the corporate and contractual setup between respondent, Consolidated Rail Corporation, and its wholly-owned subsidiary, PTL, whereby respondent claims hundreds of employees who perform services auxiliary or supplemental to the railroad are not subject to the FELA is a contract or device to avoid the FELA and thereby void as a matter of law pursuant to Title 45, U.S.C., Section 55 of the FELA.

This issue is extremely important because the factual circumstances involving the relationship between respondent, Consolidated Rail Corporation, and its wholly-owned subsidiary, PTL, is not an isolated case. To the contrary, not only ConRail, but many if not all railroads have set up similar corporations or business entities to perform the work historically and normally performed by railroad workers subject to the FELA. In this way the railroads seek to avoid liability under the FELA if these workers are injured by the negligence of their nominal employer. Inasmuch as this issue is crucial to the statutory viability of the entire FELA and has been totally ignored by the courts below, this Court should review the decision below to include a review of the contractual and corporate setup between ConRail and its wholly-owned subsidiary, PTL, as to whether or not at the very least an issue has been presented for jury determination as to whether or not the corporate and contractual relationship between respondent, ConRail, and PTL is a contract or device to avoid liability under the FELA.

B. Question 1

There is no question that the petitioner in this case applied for and accepted state worker's compensation benefits as the nominal employee of PTL, a wholly-owned subsidiary of ConRail, a common carrier by rail, without knowledge of his rights under FELA and with no intent to seek a double recovery under the separate Acts. The issue, rather, arises as to whether such application and acceptance of state benefits precludes the petitioner as a matter of law from seeking redress against the railroad under the FELA. The respondent argues he is precluded and the Supreme Court of Ohio so held.

If, however, federal law is paramount and exclusive in such matters and petitioner is able to prove that he is

an employee within the meaning of the FELA, then he cannot be precluded from seeking such redress. This is precisely the holding of this Court in *Erie R. Co. v. Winfield, supra*, where this Court held at p. 170 that:

> "It is beyond the power of any State to interfere with the operations of the federal act, either by putting carriers and their employees to an election between its provisions and those of a state statute or by imputing such an election to them through a statutory presentation."

This is because the FELA is "paramount and exclusive" and "the federal act governs to the exclusion of the state laws." *New York Central R. Co. v. Winfield, supra*, at 151.

These principles were upheld by this Court in the case of *South Buffalo R. Co. v. Ahern*, 344 U.S. 367 (1953) in which the court did permit private agreements to elect between state worker's compensation and the FELA. The Court reasoned at p. 372 that such agreements were not coercive or presumed, thereby implying that the private agreements were made with knowledge of the availability of both remedies. Ohio legislation does not provide for such private agreements and it cannot be presumed, nor is it a fact, that petitioner knowingly agreed to elect state worker's compensation in lieu of his rights under FELA.

The majority opinion in the Supreme Court of Ohio cites *Erie R. Co. v. Winfield, supra*, and *Ahern, supra*, in reaching its decision noting that it is not compelling an employee to elect between state and federal remedies, but only to present consistent claims. In so concluding the court cites *Thate v. Texas & Pacific Ry. Co.* (Tex. Civ. App. 1980), 595 S.W.2d 591, a case which stands alone in adopting the very estoppel theories denounced in the *Erie* and *Ahern* decisions. By adopting *Thate* and election of rem-

edy, the Supreme Court of Ohio reaches the very result it so clearly states it does not intend to achieve.

It is respectfully submitted that if, indeed (as was pointed out by the dissenters in the Supreme Court of Ohio), petitioner is an employee within the meaning of that word under FELA, then the position of the Texas Court in *Thate, supra* cannot be reconciled with the decision of this Court in either of the *Winfield* cases or the decision in *Ahern*. If federal law is paramount and exclusive, then the petitioner's application and acceptance of state worker's compensation benefits cannot bar him from further inquiry into the separate issues of whether or not he is entitled to compensation under the FELA.

C. Question 2

The state courts below have ruled, as a matter of law, that within the meaning of that term under the FELA petitioner was not an employee of respondent, ConRail, a common carrier by rail despite the fact that petitioner's nominal employer, PTL, was a wholly-owned subsidiary of the rail carrier performing auxiliary or supplemental services as determined by the rail carrier on property owned and maintained by the rail carrier at actual costs under a contract of indefinite duration. Inasmuch as the parties agree that federal law and the employment tests set forth by this Court in *Kelley, supra,* control this case, the more narrow issue revolves around what this Court meant when it adopted the restatement test for determining a master-servant relationship including the phrase "or right to control" as utilized in RESTATEMENT (SECOND) OF AGENCY, Section 220; i.e. under the circumstances of this case was a jury issue present with regard to the right of the respondent, ConRail, to control petitioner's nominal employer, PTL, and thereby petitioner himself despite the

fact that ConRail was not actually exercising that control at the time petitioner was injured.

The determination of an injured worker's employment status under the FELA is fundamentally a jury issue. *Baker v. Texas & Pacific Railroad Co.*, 359 U.S. 227 (1959); *Ward v. Atlantic Coastline Railroad Co.*, 362 U.S. 396 (1960); *Kelley v. Southern Pacific Company, supra.*

In *Kelley* at p. 324 this Court set forth three methods by which a plaintiff can establish "employment" with rail carriers for FELA purposes, including where the individual in question is a "subservant of a company that was in turn a servant of the railroad."

As stated, the Court then adopted the RESTATEMENT'S definition of servant as follows in pertinent part:

> ". . . a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the others control or right to control."

In analyzing control or right to control issues, it is clear that there are no rigid or technical rules for deciding the matter. Significant latitude is given to the trier of fact with regard to the factors which may be considered and the inferences and conclusions that may be reached, i.e. these are issues for jury determination.

This is recognized in the RESTATEMENT itself. RESTATEMENT (SECOND) OF AGENCY, Section 220(1), Comment (d) states that:

> "Although control or right to control the physical conduct of the person giving service is important and in many situations is determinative, *the control or right to control needed to establish the relation of master and servant may be very attenuated.*" (Emphasis added.)

The question to be answered, therefore, is whether or not reasonable minds can differ as to whether on the record before the Court respondent, ConRail, had the right to control its wholly-owned subsidiary, PTL, and thereby create a master-servant relationship with PTL by virtue of which petitioner is a subservant of ConRail.

The parties agree that at the exact time petitioner was injured ConRail was not actually exercising direct control over PTL or petitioner. The record is clear, however, that from time to time in the absence of a PTL supervisor a ConRail supervisor could and would issue instructions to PTL workers, such as the petitioner, as to which cars to load. This exercise of control without more created a jury issue in the opinions of the two dissenting Judges in the Supreme Court of Ohio.

Furthermore, in view of the corporate and contractual relationship between ConRail and PTL, can it be said that ConRail's right to control PTL is limited to only that type of circumstance where a PTL supervisor is absent. Petitioner submits that it cannot reasonably be deemed the case.

A corporate and contractual relationship almost identical to the one in this case was analyzed and discussed in *Pelliccioni, supra.* After discussing the *Kelley* test, the Court in *Pelliccioni* proceeded to apply it. In doing so the court considered the briefs submitted by the trucking company to the Interstate Commerce Commission in support of its petition for authority to operate as a "substituted motor-for-rail" service as bearing on the railroad's right to control the trucking company's activities. The briefs and the admissions therein were identical in nature to the briefs and certificates of operating authority which petitioner has entered in the record in this case. Based on that evidence, the court expressed the opinion that:

"This documentary evidence strongly suggests that the main, if not the only, reason for Transport's continued existence was to further the railroad business of its parent corporation; that it was designed to accomplish that purpose, and that the operations in which plaintiff was engaged when he was injured were in fact directed towards the objective. The arrangement between the two companies was an open-ended and on-going one. A jury could reasonably find that, irrespective of whether Penn Central exercised the right to control the employee's activities, it certainly was open to the jury to find that it had that right. In this respect the factual situation is more favorable to the employee than that presented in *Kelley*." 356 A.2d 4, 10.

See also *Kottmeyer v. Consolidated Rail Corporation*, 424 N.E.2d 345, 353 (1981).

Petitioner respectfully submits that the court in *Pelliccioni, supra,* dealt with the realities of the relationship between a common carrier by rail and its wholly-owned subsidiary in a realistic manner well within the confines of the employment test in *Kelley*. The *Pelliccioni* court does not require a finding of a master-servant relationship between the two corporations, but merely leaves it to the jury to make the determination from all the facts presented at a trial. This is all petitioner asks in this case. The courts below have incorrectly and unlawfully deprived petitioner of that opportunity.

D. Question 3

When Congress enacted the FELA, it sought to insure that the rail carriers involved did not seek to avoid liability under the Act by entering into contracts or devices which enabled them merely by the existence of such contracts or

devices to avoid liability otherwise imposed by the Act. The question is whether the contractual and corporate device in this case between respondent ConRail, and PTL was just such an attempt to avoid the FELA.

ConRail's contract with PTL provides in no uncertain terms that PTL is and will remain an independent contractor and that PTL's agents, servants and employees shall not be considered the agents, servants and employees of ConRail. It is well-settled, however, that what a contract is styled by the parties does not determine its character or their legal relationship. *Union Pacific Ry. Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 163 U.S. 564 (1896); *Cimorelli v. New York Central R. Co.*, 148 F.2d 575 (6th Cir., 1945). See also *Schroeder v. Pennsylvania Railroad Co.*, 397 F.2d 203 (7th Cir., 1968).

The entire record before the courts below clearly reveals in overwhelming detail that the entire arrangement between respondent ConRail, and PTL is in fact "a device" to enable ConRail to escape liability under the FELA. By requiring a wholly-owned subsidiary to perform services which the railroad would otherwise perform on its own, the railroad can attempt to reduce its exposure to FELA liability by simply designating the wholly-owned subsidiary as an independent contractor thereby shifting responsibility for injuries to state workers' compensation.

The arrangement between PTL and respondent, ConRail, is exactly the type of situation targeted by 45, U.S.C., Section 55, i.e. one where the railroad common carrier is taking advantage of the employee by exempting itself from liability under the FELA. Where this occurs and the statute is violated, the question of whether or not there are also valid commercial tax reasons for setting up the corporate device is certainly a secondary one.

At the very least the evidence in the record clearly creates a jury issue with respect to the railroad's attempt to evade the FELA. This is the case regardless of whether or not ConRail is actually exercising physical control over the petitioner's daily activities. *Latsko v. National Carloading Corp.*, 192 F.2d 905 (6th Cir., 1951).

CONCLUSION

The combined effect of the decision of the court below to grant respondent summary judgment was to preclude lawful consideration by a jury of the applicability of the FELA. This Court should grant certiorari, review the record, reverse the judgment of the trial court and remand this case for a full trial on the merits.

Respectfully submitted,

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APPENDIX A

Opinion and Judgment of the Supreme Court of Ohio

(Decided February 1, 1984)

No. 83-282

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

RICHARD F. SULLIVAN,
Appellant,

vs.

CONSOLIDATED RAIL CORPORATION,
Appellee.

[9 Ohio St. 3d 105]

Railroads/Federal Employers' Liability Act: railroad not liable under FELA for injuries to employee of its wholly owned subsidiary corporation, when/Workers' Compensation: one receiving benefits from state insurance fund is precluded from seeking redress under FELA, when.

1. A railroad is not liable under the Federal Employers' Liability Act for injuries to an employee of its wholly owned subsidiary corporation when the railroad did not possess the right to control the employee's actions but did control other aspects of the subsidiary's business. (*Kelley v. Southern Pacific Co.*, 419 U.S. 318, followed.)

2. An individual is precluded from seeking redress under the Federal Employers' Liability Act by claiming he is employed by a railroad when he has previously repre-

sented that he was under the employ of another entity covered by the Ohio Workers' Compensation Act and received benefits from the state insurance fund.

APPEAL from the Court of Appeals for Franklin County.

Appellant, Richard F. Sullivan, was seriously injured while loading trailer vans onto railroad cars owned by appellee, Consolidated Rail Corporation. Appellant was employed by Pennsylvania Truck Lines, Inc. ("PTL"), which was, at the time in question, a wholly owned subsidiary of appellee.

As an employee of PTL, appellant applied for and received compensation from the Ohio Bureau of Workers' Compensation. He subsequently brought this action seeking recovery from appellee pursuant to the Federal Employers' Liability Act ("FELA"), 35 Stat. 65, as amended, Sections 51-60, Title 45, U. S. Code. Under the FELA, a railroad is liable for negligently causing the injury or death of an individual while he is employed by the railroad.

Although appellant concedes that appellee did not have direct supervisory control over his actions, he contends that his work was sufficiently under the control of the railroad to bring him within the coverage of the FELA. It is clear from the record that the conditions attendant to an employer-employee relationship were performed by PTL. Pursuant to a Terminal Services Agreement between the parties, PTL performed various designated services and was paid for the performance of those services by appellee. This contract was the only mode of control which appellee possessed over the actions of appellant.

Appellee argued below that it was entitled to summary judgment on two independent grounds: appellee did not have the right to sufficiently control [106] appellant's

actions, and appellant was estopped from claiming that he was employed by the railroad.

The trial court granted appellee's motion for summary judgment on the basis that appellee did not have the right to control the daily activities of PTL employees, thereby precluding liability under the FELA. Upon appeal, the court of appeals affirmed the finding of the trial court. Finding the first argument meritorious, neither court ruled on appellee's second contention. However, appellee reasserted the argument for purposes of this appeal.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Grieser, Schafer, Blumenstiel & Slane Co., L.P.A., Mr. C. Richard Grieser and *Mr. Richard M. Huhn,* for appellant.

Messrs. Porter, Wright, Morris & Arthur, Mr. Terrance M. Miller and *Mr. Darrell R. Shepard,* for appellee.

HOLMES, *J.* This appeal presents two closely related issues to the court. First, whether a railroad may be found liable under the FELA for injuries to an employee of its wholly owned subsidiary corporation when the railroad did not possess the right to control the employee's actions. Second, whether an individual is precluded from seeking redress under the FELA when he has previously represented that he was employed by an employer covered by the Ohio Workers' Compensation Act and received benefits from the state insurance fund. The court of appeals found that appellant's injury was not compensable within the purview of the FELA as he was not an employee of the appellee railroad. We affirm.

In determining the first issue, this court is guided by the principles set forth by the United States Supreme Court in *Kelley v. Southern Pacific Co.* (1974), 419 U.S.

318. The relevant facts of *Kelley* are quite similar to those in the case *sub judice*. At the time of his accident, the petitioner in *Kelley* was employed by Pacific Motor Trucking Company, a wholly owned subsidiary of the Southern Pacific Company. The subsidiary was engaged in various trucking enterprises, primarily in conjunction with the railroad operations of its parent company. Supervisors employed by Pacific Motor controlled and directed the daily activities of its workers.

Initially, the Supreme Court stated that to satisfy the "while employed" clause of the FELA, a claimant must prove a master-servant relationship between him and the defendant railroad. See, also, *Robinson v. Baltimore & Ohio R.R. Co.* (1915), 237 U.S. 84; *Hull v. Philadelphia & Reading Ry. Co* (1920), 252 U.S. 475; *Baker v. Texas & Pacific Ry. Co.* (1959), 359 U.S. 227.

The court further noted that:

"Under common-law principles, there are basically three methods by which a plaintiff can establish his 'employment' with a rail carrier for FELA purposes even while he is nominally employed by another. First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. See Restatement (Second) of Agency § 227; *Linstead v.* [107] *Chesapeake & Ohio R. Co.*, 276 U.S. 28 (1928). Second, he could be deemed to be acting for two masters simultaneously. See Restatement § 226; *Williams v. Pennsylvania R. Co.*, 313 F.2d 203, 209 (CA 2 1963). Finally, he could be a subservant of a company that was in turn a servant of the railroad. See Restatement § 5 (2); *Schroeder v. Pennsylvania R. Co.*, 397 F. 2d 452 (CA 7 1968)." *Kelley, supra,* at 324.

Appellant contends that he satisfies the subservant category recognized in *Kelley*. However, for appellant to

be a subservant, PTL must be a servant of the railroad, and appellant must be subject to the control of both PTL and appellee. Restatement of the Law, Agency 2d 21, Section 5(2).

We have no difficulty in determining from the record that PTL is an agent of its parent company. A finding of agency is not tantamount, however, to a finding of a master-servant relationship, as the traditional right to control test would be met only if it were shown that the role of the subsidiary company was that of a conventional common-law servant. *Kelley, supra.*

The record clearly demonstrates that appellee did not have the right to control the daily operations of PTL or its employees. The companies were sufficiently distinct in organization and responsibility. Employees of the railroad did not play a significant supervisory role in the loading and unloading of railroad cars. In fact, only in the rare absence of a PTL supervisor did appellee's employees control the activities of PTL employees. We believe the interaction between companies, in the main, rises only to the passing of information and coordination which is required in such a large operation.

We hold, therefore, that a railroad is not liable under the FELA for injuries to an employee of its wholly owned subsidiary corporation when the railroad did not possess the right to control the employee's action, but did control other aspects of the subsidiary's business.

We now address the issue of whether an individual is precluded from seeking redress under the FELA when he has previously represented that he was employed by an employer covered by this state's Workers' Compensation Act and received benefits from the state insurance fund. Today's decision specifically addresses the situation when a state claim is inconsistent with a claim made under the FELA.

Appellant seeks for this court to permit him to claim PTL as his employer under the state's Workers' Compensation Act and Consolidated Rail Corporation as his employer for purposes of recovery under the FELA. We cannot allow such an inconsistency.

We have found only one case which deals directly with the fact pattern as presented by the instant case. In *Thate v. Texas & Pacific Ry. Co.* (Tex.Civ.App. 1980), 595 S.W. 2d 591, the court concluded that when an individual elects to represent himself as an employee of a local company for purposes of recovering state workers' compensation, he is estopped from claiming that he was a railroad employee to recover under the provisions of the FELA.

[108] When appellant chose to pursue his state remedy by designating PTL as his employer, he precluded himself from naming appellee as employer under his FELA claim. His choice was binding as this court cannot allow inconsistent claims under the respective state and federal statutes.

It is important to note that today's decision is not compelling an employee to elect between his federal remedy and an alternative state workers' compensation plan. We recognize that a majority of cases have held the payment and acceptance of compensation under a state workers' compensation Act does not preclude the maintenance of an action under the FELA by one engaged in interstate commerce within the Act. See, generally, Annotation, 6 A.L.R. 2d 581, and the cases cited therein. We are also fully aware that the federal Act is beyond state authority which, if exercised, would unduly interfere with the operation of the Act. *Erie R. R. Co. v. Winfield* (1917), 244 U.S. 170; *South Buffalo Ry. Co. v. Ahern* (1952), 344 U.S. 367. Our decision is merely requiring consistent claims to be presented by the claimant when seeking compensation under state and federal statutes.

Therefore, an individual is precluded from seeking redress under the FELA by claiming he is employed by a railroad when he has previously represented that he was under the employ of another entity covered by the Ohio Workers' Compensation Act and received benefits from the state insurance fund.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

CELEBREZZE, *C.J.*, W. BROWN, SWEENEY and LOCHER, *JJ.*, concur.

C. BROWN and J. P. CELEBREZZE, *JJ.*, dissent.

CLIFFORD F. BROWN, *J.*, dissenting. The decision reached by the majority affirms a summary judgment granted appellee at the trial level. I am dissenting from this decision because based on the facts and case law in this area I am firmly convinced that reasonable minds could differ on the outcome of this case. Therefore, it was improper for the trial court to enter summary judgment for the appellee.

Kelley v. Southern Pacific Co. (1974), 419 U. S. 318, forms the basis of the court's opinion. Upon closer examination it becomes evident that the case law which supported *Kelley*[1] and those cases which have since interpreted *Kelley*[2] point to a genuine question of fact as to the subservant relationship asserted by appellant. If appellant were afforded a trial these issues could be [109] presented to the trier of fact and adequately addressed and answered by such trier.

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1. See, specifically, *Williams v. Pennsylvania R.R. Co.* (C.A. 2, 1963), 313 F. 2d 203; *Schroeder v. Pennsylvania R.R. Co.* (C.A. 7, 1968), 397 F. 2d 452.

2. See, specifically, *Pellicioni v. Schuyler Packing Co.* (1976), 140 N.J. Super. 190, 356 A. 2d 4.

The majority narrowly construes the test for a subservant, set forth in *Kelley* and the Restatement of the Law, Agency 2d, when they find that appellant was not subject to the control of both PTL and appellee. In this case, Conrail had the right to control the work activity of appellant in the loading and unloading of the railroad cars. It exercised this control whenever PTL supervisors were not present at the lowest levels of the decision making process and at many administrative levels even when PTL supervisors were present. This control is the key in the determination of whether appellant was a subservant of Conrail and it presents a factual question on which reasonable minds could differ. This makes the grant of summary judgment in a case such as this inappropriate.

As to the portion of the court's decision which discusses the inability of appellant to seek recovery from both the state insurance fund and the FELA under the two theories of employment, such an analysis is incorrect if appellant is indeed a servant and subservant of PTL and Conrail, respectively. Under such a finding appellant should be able to recover from FELA even though he received state workers' compensation benefits. The court even recognizes in its opinion that a majority of cases have allowed for just such compensation when an employee is engaged in interstate commerce.

There is present in this case a question as to the master-subservant relationship between appellee and appellant. This question is not the proper basis for a grant of summary judgment but should be afforded a complete trial before the trier of fact. I would, therefore, reverse the court of appeals and remand the case to the trial court.

J. P. Celebrezze, *J.*, concurs in the foregoing dissenting opinion.

APPENDIX B

Opinion of the Court of Appeals of Ohio Tenth Appellate District

(Rendered on December 23, 1982)

No. 81AP-937

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

RICHARD F. SULLIVAN,
Plaintiff-Appellant,

RITA SULLIVAN,
Plaintiff-Appellee,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant-Appellee.

APPEAL from the Franklin County Common Pleas Court. MOYER, *J.*

This matter is before us on the appeal of plaintiff-appellant, Richard F. Sullivan (plaintiff), from a summary judgment entered in favor of defendant-appellee, Consolidated Rail Corporation (defendant).

[2] The parties do not dispute the facts that were before the trial court when it entered summary judgment for defendant. However, they do dispute the legal importance of the facts. Plaintiff was employed by the third-party defendant, The Pennsylvania Truck Lines, Inc. (PTL), which was, at the time in question, a wholly owned subsidiary of defendant railroad. On March 15, 1979, plaintiff was injured while helping load trailer vans onto defen-

dant's railroad cars in a railroad yard owned by defendant. Plaintiff was performing one of his duties of "wrenching down" a van that had been loaded onto a flatcar when a co-worker caused another van to be pushed beyond its place on the flatcar, pinning plaintiff's arm between two vans.

Plaintiff concedes that defendant did not have direct supervisory control over plaintiff's actions and it is clear from the record that the hiring and other conditions attendant to an employer-employee relationship, including the day-to-day direction and supervision of plaintiff's activities, were performed by PTL. PTL performed its work for defendant pursuant to a Trucking Service Agreement with defendant, which outlines the services to be performed by PTL and specifies that PTL must collect freight charges as directed by defendant.

Plaintiff applied for and received benefits from the Ohio Bureau of Workers' Compensation as an employee of PTL.

Plaintiff sought recovery from defendant under the Federal Employers' Liability Act in count three of his supplemental complaint. The trial court found that, because PTL exercised actual physical control over plaintiff's work and because defendant did not, there was no genuine issue as to any material fact and that defendant was entitled to judgment **[3]** as a matter of law.

In support of his appeal, plaintiff asserts the following assignment of error:

> "The Court of Common Pleas for Franklin County in Case No. 79CV-07-3714 erred in sustaining defendant's motion for summary judgment as to plaintiff's claim pursuant to the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 and following, under Count Three of plaintiff's supplemental complaint."

This appeal presents us with the following legal question: may a railroad subject to the Federal Employers' Liability Act be found liable for injuries to an employee of its wholly owned subsidiary where the railroad has no actual physical control over the day-to-day work of said employee but does have the right to control other aspects of the motor carrier's business such as the tariffs it charges, the traffic it handles and other corporate decisions?

Plaintiff argues that, pursuant to certain documents filed with the Interstate Commerce Commission and the corporate relationship of the two companies, defendant railroad exercises enough control over its motor carrier subsidiary, PTL, to create a master-servant relationship between the two entities and that plaintiff thereby becomes a subservant of the railroad.

Defendant argues that plaintiff must show that the defendant has the right to actually control the details of PTL's activity and that plaintiff has failed to create a genuine issue of fact on that issue.

The subservant theory of liability is defined in 1 Restatement of Agency 2d 21, Section 5 (1957) as follows:

> "(2) A subservant is a person appointed by a servant empowered to do so, to perform functions [4] undertaken by the servant for the master and subject to the control as to his physical conduct both by the master and by the servant, but for whose conduct the servant agrees with the principal to be primarily responsible."

The leading and controlling case on the question before us is *Kelley v. Southern Pacific Co.* (1974), 419 U.S. 318. In *Kelley*, the railroad contracted with a motor carrier subsidiary (PMT) whose primary work was performed in conjunction with the railroad. Kelley was employed by

PMT to unload automobiles from the railroad's flatcars and drive them to auto trailers owned by PMT. Kelley was nominally employed by and supervised by PMT. He was injured when he fell from the top of a flatcar and received Workman's Compensation from PMT.

The District Court found that Kelley was an employee of the railroad for F.E.L.A. purposes because the job of unloading automobiles was the railroad's responsibility pursuant to its contracts with shippers and its tariff responsibilities; that the railroad provided the ramps and owned the area in which PMT employees worked; that the responsibility for supervision of the unloading operations was the railroad's, even though PMT actually performed that function; that PMT was serving generally as the railroad's agent; and that Kelley's work constituted a nondelegable duty of the railroad.

The Court of Appeals reversed the District Court and the Supreme Court affirmed the Court of Appeals. The Supreme Court held that the "while employed" clause of the F.E.L.A. requires: (1) that the F.E.L.A. plaintiff be an agent of the rail carrier; (2) that said plaintiff be the carrier's servant; and (3) that the evidence must establish a master-servant relationship between the railroad and the **[5]** motor carrier to render the employee a subservant of the railroad.

Observing that a finding of agency is not tantamount to a finding of a master-servant relationship, the Supreme Court set forth a test to be used in determining whether the motor carrier is a servant of the railroad. The court reviewed its earlier F.E.L.A. cases and emphasized that "[f]rom the beginning the standard has been proof of a master-servant relationship between the plaintiff and the defendant railroad." *Kelley, supra,* at 476. That is, the

master-servant relationship runs from the railroad through the motor carrier (PTL) to the injured employee.

The court further observed that the District Court's finding "* * * that the railroad was 'responsible' for the unloading operations is significantly weaker than would be a finding that it controlled or had the right to control the physical conduct of the PMT employees in the course of their unloading operations." *Id.*, at 477. The court stated that the "control or right to control" test would be met only if it were shown that the role of the second company (motor carrier) was that of a conventional common law servant. In a footnote, the court further explained that the fact that the railroad had contracts with other parties and was controlled by tariff regulations did not determine its relationship with the motor carrier. The railroad was free to use its own employees in unloading the automobiles or to subcontract the work to another company. The court further stated that the publication of tariffs for the unloading services did not automatically render anyone who performed those tasks an employee of the railroad for F.E.L.A. purposes. *Id.*, see footnote 7, at 477.

[6] In reviewing another element of the relationship between the railroad and the motor carrier, the Supreme Court, in *Kelley*, held that the findings by the District Court that Kelley's crew worked most of the time on the railroad's premises, that railroad employees were responsible for checking safety conditions, and that railroad employees from time to time would advise or consult with PMT employees and supervisors demonstrated only that certain employees of the railroad and of PMT had substantial contact with one another and that some of their activities were necessarily closely related and coordinated. The court went on to emphasize that the trial court did not find that the railroad employees "played a significant

supervisory role in the unloading operation or, more particularly, that petitioner [Kelley] was being supervised by Southern Pacific [railroad] employees at the time of his injury." *Id.*, at 477. The court further noted that the trial court did not find that the railroad employees had any general right to control the activities of Kelley and other PMT workers.

Finally, the court observed that the two companies were sufficiently distinct in organization and responsibility that there was no apparent overlap in the supervisory ranks. The court's reference to earlier cases leaves no doubt that it opted for a strict construction of the control or right to control test. See *Robinson v. Baltimore & Ohio Rail Co.* (1915), 237 U.S. 84 and *Chicago, Rock Island & Pacific Railway Co. v. Bond* (1916), 240 U.S. 449. In the case of *Baker v. Texas and Pacific Railway Co.* (1959), 359 U.S. 227, the court held that an employee was covered by F.E.L.A. where a supervisor employed by the railroad "'* * * in the daily course of the work exercised directive control over [7] the details of the job performed by the individual workmen, including the precise point where the mixture should be pumped, when they should move to the next point, and the consistency of the mixture.' 359 U.S., at 228-229 * * *." *Kelley, supra,* at 479. The *Baker* case is instructive because the railroad exercised considerable control over the physical activities of its agent's employees, a condition that is not present in the case before us.

Another case cited by the Supreme Court in which the subservant theory was applied is *Schroeder v. Pennsylvania R. Co.* (C. A. 7, 1968), 397 F.2d 452. Plaintiff argues that the facts in *Schroeder*, where the court held the railroad liable on a subservant theory, are virtually identical to the facts in this case. However, a close reading

of *Schroeder* indicates otherwise. In *Schroeder,* where the employee of the motor carrier was crushed between two trailers, the Court of Appeals held that the case was properly submitted to the jury because the railroad determined which trailers were to be picked up by the employees of the motor carrier; the railroad issued directions regarding the size of the trailers and the time and manner of making pick ups; the railroad had exclusive knowledge of the location of particular trailers in the trailer yard; and the railroad inspected the trailers and assigned different trailers to the motor carrier employees if a trailer was dirty.

The Court of Appeals also referred to the contract between the motor carrier and the railroad. It is significant that the Court of Appeals' opinion rests upon both the evidence of substantial actual supervisory control by the railroad over the motor carrier employees and upon the contract between the motor carrier and the railroad rather than [8] upon the contract alone, as plaintiff seems to suggest.

We must assume that, because the Supreme Court cited the *Schroeder* case when it first referred to the subservant theory of recovery as the basis upon which it was deciding *Kelley,* the court was indicating its approval of the Court of Appeals' application of the subservant principle in *Schroeder.* A comparison of the facts in this case to the facts in *Schroeder* causes us to conclude that the railroad in *Schroeder* exercised substantially more supervisory control over the employees of the common carrier than defendant exercised over PTL in this case, and that the degree of control was the primary basis upon which *Schroeder* was decided. Furthermore, *Schroeder* does not stand for the proposition that the railroad's liability may flow from a contract between the railroad

and the motor carrier which establishes general responsibilities and duties between the two parties. The court in *Schroeder* simply did not make that statement of law as plaintiff seems to argue in this case.

The plaintiff argues that the subsidiary status of PTL and the contractual relationship between defendant and PTL should cause us to conclude that defendant had the right to control the actual physical activities of PTL's employees. Plaintiff further argues that the Supreme Court in *Kelley* did not have that specific issue before it and that we should, therefore, expand the *Kelley* rule to include what is, in effect, an assumption that the defendant in this case could have controlled the day-to-day activities of PTL's employees if it chose to. Plaintiff argues that we should follow the cases of *Kottmeyer v. Consolidated Rail Corp.* 98 Ill. App. 3d 365, (1981), 424 N.E.2d 345 and *Pelliccioni v. Schuyler Packing Co.* 140 N.J. Sup. 190, (1976), 356 A.2d 4. However, in *Kottmeyer* **[9]** there was sufficient evidence of actual supervisory control by Consolidated Rail Corporation to send the case to the jury. While the Court of Appeals in *Kottmeyer* discussed the right to control, it held that the railroad's right to control was evidenced by the fact that it did actually control the day-to-day operations of PTL.

With respect to *Pelliccioni*, we agree with defendant that the Court of Appeals of New Jersey expanded the *Kelley* rule far beyond the facts of *Kelley*. We are not bound by the *Pelliccioni* decision and are not persuaded by its reasoning.

Our review of the evidence in the record that was appropriately submitted pursuant to the filing of a motion for summary judgment causes us to conclude that the trial court did not err in granting summary judgment for the defendant. There is no evidence that defendant ac-

tually controlled or had the right to control the day-to-day activities of the employees of PTL with the exception of an occasional absence of a PTL supervisor in which case one of defendant's employees was required to temporarily supervise the yard. The contact between defendant's employees and PTL's employees rises only to the level of providing necessary coordination and contact between the employees of the two companies, and there is no evidence that defendant's "employees played a significant supervisory role in the unloading [or loading] operation or, more particularly, that * * * [plaintiff] was being supervised by * * * [defendant] employees at the time of his injury." *Kelley, supra,* at 477.

With respect to plaintiff's argument that the corporate contractual and regulatory relationship between defendant and PTL creates in defendant a right to control the day-to-day activities of PTL employees, **[10]** we are simply not persuaded, first, that such a conclusion can be made from the evidence before us and, secondly, that such a test is sanctioned by *Kelley*.

Defendant has argued that plaintiff is estopped from asserting a claim against defendant under the Federal Employers' Liability Act because plaintiff applied for and has received benefits from the Workers' Compensation Fund of Ohio on the basis that he was an employee of PTL at the time of the accident. Because of our disposition of plaintiff's assignment of error, it is not necessary to consider defendant's estoppel argument. The assignment of error is overruled.

For the foregoing reasons, the judgment of the trial court is affirmed.

Judgment affirmed

WHITESIDE, *P.J.*, and MCCORMAC, *J.*, concur.

APPENDIX C

Decision of the Court of Common Pleas of Franklin County, Ohio

(Rendered October 9, 1981)

Case No. 79-CV-07-3714

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

RICHARD F. SULLIVAN, *et al.*,
Plaintiffs,

vs.

CONSOLIDATED RAIL CORPORATION, *et al.*,
Defendants.

DECISION

Rendered this 9th day of October, 1981.

FAIS, *J.*

This matter comes before the Court on defendant Consolidated Rail Corporation's motion for summary judgment as to Count Three of Plaintiffs' Supplemental Complaint asserting a claim under 45 U.S.C. Section 51, usually known as F.E.L.A. The Court finds, after non-oral hearing, that there are no genuine issues of material fact and that defendant Conrail is entitled to judgment as a matter of law on this count. The extensive memoranda of counsel boil down to this one key question: did Conrail have physical control over the conduct of plaintiff Richard Sullivan's work? Based on *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974), the other authorities cited by counsel, and the deposition testimony, the Court can only conclude

that there is no genuine issue as the dispositive point that Pennsylvania Truck Lines had actual physical control over plaintiff's work and Conrail had no such control. Corporate and/or contractual control is no substitute for actual on the job control of an employee.

[2] The motion for summary judgment is SUSTAINED as to Count Three. The case shall proceed on the remaining counts.

/s/ G. W. Fais
Judge